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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH DARRYL RHODES, Defendant and Appellant.	C059226 (Super.Ct.No. 03F06878)

Defendant Kenneth Darryl Rhodes entered a beauty salon, held the hair stylist and her 18-year-old customer against their will with threats that he would "cut [them] up" if they disobeyed his commands, robbed the stylist of cash, and then sexually assaulted the customer. A jury convicted him of two counts of false imprisonment and one count each of robbery, attempted robbery, assault with intent to commit rape, and sexual penetration with a foreign object. The jury further found that defendant had previously been convicted of three separate robberies ("strikes" within the meaning of the three strikes law and serious felonies

within the meaning of Penal Code section 667, subdivision (a)). He was sentenced to state prison for 150 years to life (six consecutive terms of 25 years to life), plus a consecutive term of 30 years for the prior serious felony enhancements.

On appeal, defendant contends (1) he was deprived of the right to the effective assistance of counsel because his trial attorney failed to examine a certain piece of evidence prior to trial; (2) the court erred by instructing the jury with CALCRIM No. 224; (3) his constitutional rights were violated by the court's ruling precluding his attorney from commenting during closing argument that defendant never admitted to committing the crimes; and (4) the jury was coerced into reaching a verdict. We shall affirm the judgment.

FACTS

On May 8, 2003, Marlene Laughtin and her 18-year-old customer, C.W., were the only persons in a hair salon when defendant entered and announced, "I'm here to rob you." Defendant was wearing latex gloves, a gray hooded sweatshirt with the hood pulled down around his face, large gold-rimmed glasses, black sweatpants, and black tennis shoes. He looked as though he was clutching something in his sweatshirt pocket and said, "I have a knife. And if you don't do as I say, I'm gonna cut you up." He then ordered Laughtin and C.W. to the back of the salon and shoved them into the shampoo bowl area.

C.W. sat on the floor while defendant went through her purse. Finding no cash, defendant became irritated and told both C.W. and Laughtin to undress. On the verge of tears, C.W. undressed down to

her underwear. Laughtin refused but, when defendant threatened to "take it out" on C.W. if Laughtin did not comply with his demand, she took off her shoes and pants.

Defendant then asked Laughtin where the cash register was and ordered C.W. to lie flat on her stomach. Laughtin took defendant to the cash drawer at her stylist station and handed him roughly $300. When defendant and Laughtin returned to the shampoo bowl area, defendant sat down on the edge of a dryer chair and ordered Laughtin to lie on her stomach as well. Laughtin refused, but agreed to kneel down instead.

At this point, defendant took a deep breath, looked at Laughtin and C.W., got up as if to leave, sat down again, and then jumped onto C.W., ripping off her bra and trying to remove her panties. C.W. screamed and cried as Laughtin prayed aloud. Defendant told Laughtin to "shut the fuck up" and momentarily pulled out his penis. C.W., still flat on her stomach, began to kick her legs and managed to extricate herself from her position beneath defendant. Defendant grabbed C.W., who was now seated with her back against the wall, and sucked on her left breast for a couple seconds as she continued to kick and scream. Defendant then flipped C.W. over, again pulled out his penis, and inserted one of his fingers into her vagina. C.W. again managed to free herself from defendant's grasp, turned herself around and, with her back against the wall, kicked defendant in the shoulder with enough force to stand him up. C.W. again kicked defendant, this time in the stomach, and Laughtin began to hit him with her shoe until he fled from the salon.

Laughtin chased defendant to the door, immediately witnessed a black, compact car pull out of the alley behind the salon, and called 9-1-1.

When defendant's black, four-door, Dodge Neon was searched several days after the robbery and assault, a box of latex gloves was found in the trunk, and a latex glove was also found in the passenger compartment. Another latex glove was discovered in a gray hooded sweatshirt found at defendant's residence; C.W. identified this sweatshirt as being consistent with the one worn by her attacker. The sole of a shoe found at defendant's residence had a diamond pattern that matched a wet shoe print found at the salon in the area of the attack; C.W. stated the shoes found in defendant's home "very closely resembled" the shoes worn by her attacker. C.W. also identified a pair of sweatpants found at defendant's residence as being "very similar" to the pants worn by her attacker.

Defendant's DNA matched that collected from C.W.'s left breast. And both Laughtin and C.W. positively identified defendant at trial as being the assailant.

Defendant's theory of the case was mistaken identity based on the following:

C.W. described her attacker as having a circumcised penis; defendant's penis was not circumcised.

During a photographic lineup roughly two months after the attack, Laughtin eliminated defendant's photograph. Although C.W. identified defendant as the most likely perpetrator, she ranked his

photograph a 6 out of 10, and testified her confidence in this identification was roughly 50 percent.

Laughtin and C.W. had rejected most of the clothing seized at defendant's residence as being the clothes worn by the assailant; they merely identified the sweatshirt as being "similar" and therefore could "very possibly" have been the sweatshirt. While C.W. also stated the shoes "very closely resembled" the shoes worn by her attacker, she "was bothered" by the fact that she did not remember there being any white on the shoes.

Immediately after the attack, Laughtin told the 9-1-1 operator that the car she saw leaving the alley behind the salon was a small, black, two-door car, whereas defendant drove a black, four-door, Dodge Neon.

To explain the in-court identifications, defendant elicited testimony that the identifications were made after Laughtin and C.W. were told defendant's DNA matched DNA collected from C.W.'s breast. Defendant also cross-examined the DNA expert extensively.

In an attempt to explain the latex gloves in his car, defendant called two witnesses who testified defendant had worked at a linen company, which made latex gloves available to protect employees from coming in contact with soiled linens.

Defendant also took the stand, not to testify, but to attempt to show he did not match the physical description of the assailant.

DISCUSSION

I

Defendant asserts his convictions must be reversed because his trial attorney rendered ineffective assistance of counsel

by failing to examine the gray sweatshirt that C.W. identified as being consistent with the sweatshirt worn by her attacker. We disagree.

A

As already indicated, a latex glove was discovered in a gray hooded sweatshirt found at defendant's residence. This discovery occurred, rather dramatically, at trial as the lead detective on the case was being cross-examined by defendant's attorney. During direct examination, the detective testified that, after he showed C.W. several articles of clothing seized from defendant's residence, she said the sweatshirt "was similar" to the sweatshirt worn by her attacker. On cross-examination, defendant's attorney asked the detective to remove the sweatshirt from its sealed evidence bag. When the detective did so, he noticed a latex glove in the sweatshirt pocket. The newly-discovered glove was then marked as a separate exhibit and entered into evidence.

Seemingly unphased by this unexpected discovery, defense counsel cross-examined the detective on C.W.'s less-than-confident identification of the sweatshirt--eliciting testimony that she identified the sweatshirt's color, size, and fabric as only being "consistent" with the sweatshirt worn by her attacker, and that it was only "very possible" it was the same sweatshirt.

During the People's closing argument, the prosecutor talked about the strength of the case against defendant, the in-court identifications, DNA evidence, latex gloves found in defendant's car, which roughly matched the car seen leaving the scene, and defendant's shoes matching the shoe print left at the salon.

The prosecutor then argued: "As if that wasn't enough, we come to this Perry Mason moment last Wednesday in front of all of you in trial, and it's almost as [though] someone up there is pointing down to [defense counsel] and saying ['']oh, no, you're not going to walk this guy,['] because I don't know if you appreciate what happened there, but that doesn't happen in every trial, all right. Trust me, it does not." The prosecutor continued: "I don't even think you have seen it happen on TV, all right? That moment, aside from being a little funny, I hope you take it for what it was worth, okay? Because the evidence[,] in one sort of dramatic oops in front of you all[,] went from there being some fairly probative evidence before you that [C.W.] had identified the actual hooded sweatshirt that [defendant] wore during the attack, to actually, you know. You know. You know. You know. You now know what he was wearing. You know what he was wearing. This is what he was wearing."

B

According to defendant, (1) "defense counsel's failure to examine the physical evidence prior to trial deprived [defendant] of the effective assistance of counsel, and [counsel's] consequent introduction of inculpatory evidence in the middle of trial, certainly fell below an objective standard of reasonableness," and (2) "[b]ecause the prosecutor used this 'Perry Mason' moment to heavily ridicule the entire defense of mistaken identity, counsel's failure undermines confidence in the outcome of this trial." Not so.

A defendant in a criminal proceeding has the right to effective assistance of counsel under both the Sixth Amendment to the United

States Constitution and article I, section 15 of the California Constitution, thus entitling him to "'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The burden of proving a claim of inadequate assistance of counsel is squarely upon defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) He "'must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" (*In re Harris* (1993) 5 Cal.4th 813, 832-833; see also *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216-217; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].)

Here, assuming defense counsel's failure to examine the sweatshirt prior to trial fell below an objective standard of reasonableness, we find no reasonable probability that, but for counsel's failure, the result of the proceeding would have been different.

The People argue that, even if defense counsel had examined the sweatshirt and found the latex glove in the pocket, all that this would have done is to prevent the "Perry Mason moment" from

occurring in front of the jury; the glove would still have come into evidence, and the jury would still have been informed that the glove was discovered in the sweatshirt that was recovered from defendant's residence. This is so, argue the People, because defendant's attorney, upon discovering the glove in the sweatshirt pocket, would have been ethically required to turn it over to the prosecution.

While the People cite no authority for this proposition, *People v. Meredith* (1981) 29 Cal.3d 682, at pages 689-695, supports the view that if defendant's attorney had examined the sweatshirt prior to trial and removed the glove from the pocket, or altered the glove in any way, depriving the prosecution of the opportunity to observe the glove in its original condition and location, then he would have been required to turn the glove over and reveal the place of discovery. However, we can conceive of a situation in which defense counsel could have examined the sweatshirt and, as happened at trial, simply noticed the glove protruding from the pocket. In such a case, counsel would not have removed or altered the glove in a manner that would have deprived the prosecution of the opportunity to observe the glove in its original condition and location, and could have simply returned the sweatshirt to the People. We have found no case holding that a defense attorney is required to explain to the People the significance of evidence already in their possession.

Nonetheless, assuming defendant's attorney had investigated the sweatshirt and discovered the glove without triggering the ethical duty to inform the prosecution of its presence, and thus

had not asked for the sweatshirt to be removed from the evidence bag (thereby creating the Perry Mason moment), we conclude there is no reasonable probability that defendant would have obtained a more favorable result at trial.

According to defendant, "the problems with the state's case were significant." We disagree. Indeed, we find the evidence against him was strong. His DNA was found on C.W.'s breast; both C.W. and Laughtin positively identified him at trial; C.W. identified defendant's sweatshirt, sweatpants, and shoes as being consistent with the clothes worn by her attacker; his shoes matched the wet shoe print found in the salon; latex gloves were discovered in defendant's car; and his car roughly matched the description of the car Laughtin saw leaving the scene immediately following the attack. Regardless of the fact that the jury twice indicated deadlock, we do not view this as a close case.

Having failed to demonstrate that he was prejudiced by his trial attorney's omission, defendant has failed to establish that he was deprived of the effective assistance of counsel.

II

Defendant claims the trial court violated his constitutional rights by instructing the jury with CALCRIM No. 224.

As given, that instruction told the jurors: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must

be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

Defendant contends that, because the instruction sets forth two cautionary principles, i.e., "that evidence be proved beyond a reasonable doubt and that the jury must acquit if there is a reasonable interpretation of the evidence that points to innocence," and since the instruction limits those principles to circumstantial evidence, "it is both obvious, and logical" that this instruction erroneously "told the jurors that these principles did not apply to direct evidence."

In support of his contention, defendant relies on *People v. Vann* (1974) 12 Cal.3d 220 (hereafter *Vann*). Defendant misreads both the instruction and *Vann*.

First, "CALCRIM No. 224 does not set out basic reasonable doubt and burden of proof principles; these are described elsewhere." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 931.) Here, the trial court instructed the jury with CALCRIM No. 220, explaining that the presumption of innocence "requires that the People prove a defendant guilty beyond a reasonable doubt," that "[i]n deciding whether the People have proved their case beyond a reasonable doubt, [the jury] must impartially compare and consider *all of the evidence*

that was received throughout the entire trial," and that "[u]nless *the evidence* proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and [the jury] must find him not guilty." (Italics added.) Additionally, CALCRIM No. 223 explained to the jury that "[f]acts may be proved by *direct or circumstantial evidence* or by a combination of both." (Italics added.) Accordingly, when read together, these instructions informed the jurors that the reasonable doubt standard applied to all evidence, not just circumstantial evidence.

Second, while defendant is correct that CALCRIM No. 224 tells jurors that, "in determining whether a fact necessary for conviction has been proved beyond a reasonable doubt, circumstantial evidence may be relied on only if the only reasonable inference that may be drawn from it points to the defendant's guilt," he is mistaken to believe this same limitation applies to direct evidence. (*People v. Anderson*, *supra*, 152 Cal.App.4th at p. 931.) Quite the contrary. "Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference. Thus, as to direct evidence, there is no need to decide whether there is an opposing inference that suggests innocence." (*Ibid.*; accord, *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187.)

Defendant's reliance on *Vann* is misplaced because it involved a situation in which the jury was not instructed that a defendant is presumed to be innocent and that the prosecution had the burden of proving guilt beyond a reasonable doubt. (*Vann*, *supra*, 12 Cal.3d

at p. 225.) Conceding error, the People contended the error was not prejudicial because the jury was instructed that "an accused cannot be convicted on circumstantial evidence except where such evidence proves the issue beyond a reasonable doubt." (*Id.* at p. 226.) *Vann* disagreed, explaining "[a]n instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality." (*Id.* at pp. 226-227.)

Here, as already indicated, the jury was instructed on the presumption of innocence and was told that the reasonable doubt standard applied to all evidence, not just circumstantial evidence.

There was no instructional error.

III

We also reject defendant's contention that his convictions must be reversed because the trial court precluded his attorney from commenting, during closing argument, that defendant never admitted to committing the crimes.

"A criminal defendant's constitutional rights to counsel and to a jury trial encompass a right to have his theory of the case argued vigorously to the jury. [Citations.]" (*United States v. DeLoach* (D.C. Cir. 1974) 504 F.2d 185, 189 (hereafter *DeLoach*).) And while, "'[t]he trial court has broad discretion in controlling the scope of closing argument,'" that discretion is abused, and defendant's constitutional rights violated, "'if the court prevents

defense counsel from making a point essential to the defense.'" (*Ibid.*) "'In regulating the scope of argument, the court should be guided by criteria that are related to the function of argument, i.e., to help the jury remember and interpret the evidence. The prosecutor and the defense counsel in turn must be afforded a full opportunity to advance their competing interpretations. . . . The court should exclude only those statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.'" (*Ibid.*)

Here, after spending considerable time arguing to the jury that the in-court identifications were problematic and that defendant did not match the physical description given by Laughtin and C.W., defense counsel rhetorically asked the jury whether, aside from the DNA evidence, there was any evidence corroborating the victims' claim that defendant was the attacker. Counsel then stated: "We don't have any admissions, nothing by [defendant] in evidence saying I did that, or I might have done that, or I was there, or it was me, or anything like that."

The People's objection to this line of argument was sustained as "inappropriate." Defense counsel moved on. However, a portion of his visual presentation listed "no admissions" as one of the failures of the People's case against defendant. The prosecutor's objection to these words appearing in the visual presentation was sustained, and counsel was directed to remove them from the presentation.

Thereafter, outside the presence of the jury, defense counsel argued that he was simply commenting on "the lack of evidence," specifically the fact there was no evidence of any admissions made

by defendant. In response, the prosecutor stated defendant invoked his right to remain silent, and the People would not be able to comment on defendant's silence without violating *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (hereafter *Doyle*).[1] The trial court confirmed its ruling.

We conclude defendant should have been allowed to comment on the lack of admissions in the People's case against him, but find the error to have been harmless.

If "[c]omments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112), then, by parity of reasoning, a defendant must be allowed to comment on the People's failure to introduce material evidence connecting defendant to the crimes charged. Evidence that defendant admitted to committing the crimes would certainly have been material evidence.

Apparently, the trial court believed that, because defendant invoked his right to remain silent and the People would be precluded from commenting on such silence without violating his constitutional rights, defendant should not be allowed to comment on the People's failure to introduce evidence that he admitted to committing the crimes. We disagree.

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[1] While the prosecutor actually said that comment on defendant's post-*Miranda* silence would "invite *Griffin* error," the parties agree the prosecutor meant to refer to *Doyle v. Ohio, supra,* 426 U.S. 610 [49 L.Ed.2d 91], holding that the prosecution's use of a defendant's post-*Miranda* silence is a violation of federal due process.

Generally, where a defendant invokes his right to remain silent following arrest, the People may not comment on his post-*Miranda* silence without violating federal due process. (*Doyle*, *supra*, 426 U.S. 610 [49 L.Ed.2d 91].) However, as the People acknowledge, where a defendant adverts to his own post-*Miranda* silence, the prosecutor may comment on such silence if the comment "constitutes a fair response to defendant's claim or a fair comment on the evidence." (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448; see *United States v. Robinson* (1988) 485 U.S. 25, 32 [99 L.Ed.2d 23, 31] [rejecting a claim of error under *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106], the court held that where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, . . . there is no violation of the privilege"].) "Questions or argument suggesting that the defendant did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257, citing *People v. Austin* (1994) 23 Cal.App.4th 1596, 1612-1613, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861.)

The same rationale applies here, where defendant's attorney commented during closing argument that a failure of the People's case was the lack of any admissions. In such a situation, *Doyle* would not have precluded the prosecutor from commenting on the reason for the lack of admissions, namely, defendant's invocation of the right to remain silent. Accordingly, the trial court should have allowed defendant's argument regarding the lack of admissions.

Nevertheless, we are convinced beyond a reasonable doubt that the error was harmless. (See *In re Wagner* (1981) 119 Cal.App.3d 90, 114.)

First, unlike *DeLoach*, where restrictions placed on defense counsel's argument "cut to the core of counsel's theory of the case" by preventing him from "suggesting to the jury [another individual] may have committed the murders and lied about [defendant] to cover up his own guilt" (*DeLoach*, *supra*, 504 F.2d at p. 191), here, counsel vigorously argued to the jurors his theory of mistaken identity and was merely prevented from commenting on the fact that defendant did not admit to committing the crimes. This comment was not central to defendant's theory of the case. (*Id.* at p. 191, fn. 14 ["When an error appears during closing argument, the centrality or importance of the issue infected by error is a significant factor in determining whether prejudice resulted"].)

Second, this was not a close case. Defendant's DNA was found on C.W.'s breast; C.W. and Laughtin positively identified defendant at trial; C.W. identified defendant's sweatshirt, sweatpants, and shoes as being consistent with the clothes worn by her attacker; defendant's shoes matched the wet shoe print found in the salon; latex gloves were discovered in defendant's car; and defendant's car roughly matched the description of the car Laughtin saw leaving the scene immediately following the attack.

We conclude beyond a reasonable doubt that allowing full comment on the lack of any admissions by defendant would not have changed the outcome.

IV

Finally, we reject defendant's assertion that the jury was coerced into reaching a verdict.

"Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (Pen. Code, § 1140.)

"The determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. [Citation.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775; *People v. Sheldon* (1989) 48 Cal.3d 935, 959.)

Here, the jury began its deliberations on the afternoon of January 29, 2008, requested readback of certain testimony and the transcript of the 9-1-1 call, and deliberated for almost an hour and a half before retiring for the night. Deliberations resumed the next day and continued until 2:30 p.m., when the court reporter started readback of the requested testimony. At 4:30 p.m., the jury again retired for the night. Deliberations continued the following day, and at 4:00 p.m., the jury indicated a deadlock.

The next morning, the jury was instructed: "Please continue deliberating. Given the amount of time the jury has spent listening

to read back of testimony, the court is not satisfied that the jury has sufficiently deliberated. If there is anything else the court can do to help you with your deliberations, such as read back of other testimony or answering any questions, please advise. Otherwise, please continue with your deliberations." The jury then deliberated for another seven hours before retiring for the weekend.

Monday morning, the jury deliberated for roughly 20 minutes before again indicating a deadlock. This time the jury said: "We are not going to come to a unanimous decision. Further deliberation is useless." When the jury returned to the courtroom, the foreperson told the court that eight votes had been taken, there had been some movement in the votes, the numerical breakdown of votes was eleven to one, and further deliberation would not be useful.

In response, the trial court instructed the jury as follows:

"Your goal as jurors should be to reach a fair and impartial verdict, if you are able to do so, based solely on the evidence presented and without regard for the consequences of your verdict, regardless of how long it takes to do so.

"It is your duty as jurors to carefully consider, weigh, and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors.

"In the course of your further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine [theirs].

"You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest other jurors change their views if you are convinced they are wrong.

"Fair and [e]ffective jury deliberations require a frank and forthright exchange of views.

"As I previously instructed you, each of you must decide the case for yourself, and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors.

"It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charges, if you can do so, without violence to your individual judgment.

"Both the People and the defendant are entitled to the individual judgment of each juror.

"As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way you deem appropriate.

"May I suggest that since you have been unable to arrive at a verdict using the methods that you've chosen so far, that you consider to change the methods you've been following at least temporarily and try new methods.

"For example, you may wish to consider having different jurors lead the discussions for a period of time, or you may wish to experiment with reverse role-playing by having those on one side of the issue present and argue the other side's position and vice versa. This might enable you to better understand the others' positions.

"By suggesting [that] you should consider changes in your methods of deliberations, I want to stress I am not dictating or instructing you as to how to conduct your deliberations.

"I'm merely finding you may find it productive to do whatever . . . is necessary to ensure that each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors."

The trial court then reminded the jurors of CALCRIM Nos. 200 and 3550 regarding the duties of jurors and ordered deliberations to continue.

Defendant's counsel objected to the instruction, arguing that it would improperly coerce the single holdout juror to change his or her vote based solely on the pressure exerted by the other eleven jurors. The objection was overruled.

The jury reached a verdict later in the day. When the jury was polled following the announcement of the verdict, Juror No. 9 "seemed a bit emotional."

Defendant claims reversal is required because the challenged instruction "basically told the jury the trial court would not accept a deadlock, creating undue pressure on the holdout juror to relinquish her views and arrive at a verdict lest the entire jury remain in deliberations forever." We are not persuaded.

In *People v. Moore* (2002) 96 Cal.App.4th 1105 (hereafter *Moore*), this court approved the use of this precise instruction. The instruction in *Moore* was given after the jury indicated a deadlock following one day of deliberation. (*Id.* at p. 1118.) *Moore* explained: "Nothing in the trial court's charge was designed to

coerce the jury into returning a verdict. [Citation.] Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation. [¶] Additionally, the court directed the jurors to consider carefully, weigh and evaluate all of the evidence presented at trial, to discuss their views, and to consider the views of their fellow jurors. Finally, the court instructed that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge '*if you can do so without violence to your individual judgment*.' . . . [¶] Contrary to defendant's argument on appeal, the jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement." (*Id.* at p. 1121.) Far from finding any coercion, we commended the trial judge for "fashioning such an excellent instruction." (*Id.* at p. 1122.)

Acknowledging that "[a]ny claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case" (*People v. Pride* (1992) 3 Cal.4th 195, 265), we disagree with defendant's assertion that the circumstances of this case made an otherwise excellent instruction coercive. While defendant is correct "the jury deliberated for over 20 hours during the course of 5 days, taking 8 separate votes," this does not necessarily mean that further deliberations would not help the jurors to enhance their understanding of the case. (See *People v. Proctor* (1992) 4 Cal.4th 499, 539.) Indeed, a considerable amount of time was spent

listening to read back of testimony, and the foreperson had indicated there had been some movement in the votes. The trial court was not required to accept the jurors' assessment that further deliberation would be not be useful. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 774 [finding no coercion where the trial court instructed the jury to continue deliberating after four expressions of impasse and a note expressing that the jury was "'hopelessly deadlocked'"].)

Finally, we do not accept defendant's position that "where the vote stood at 11 to 1, this instruction put undue pressure on the holdout juror who would necessarily feel coerced into joining the majority jurors' view on the case lest the jury be permanently kept in deliberations." There "is always a *potential* for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal. In such a case, the judge's remarks to the deadlocked jury regarding the clarity of the evidence, the simplicity of the case, the necessity of reaching a unanimous verdict, or even the threat of being 'locked up for the night' might well produce a coerced verdict. [Citation.]" (*People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960.) However, here, the challenged instruction "could not have been interpreted by the holdout juror as an agreement with the position taken by the 11 jurors voting for conviction." (*Id.* at p. 960.)

Simply put, as was the case in *Moore*, "the trial court took great care in exercising its power 'without coercing the jury into abdicating its independent judgment in favor of considerations of

compromise and expediency. . . . Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict . . . .'" (*Moore*, *supra*, 96 Cal.App.4th at p. 1121, quoting *People v. Proctor*, *supra*, 4 Cal.4th at p. 539.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

BLEASE, J.

SIMS, J.